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No. 97-16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents have chosen not to waste words in defense of the standing theory they presented in their Complaint and affidavits in the courts below, or in defense of the decision of the Sixth Circuit as it was actually rendered on the merits. Instead, they offer a range of theories under which they assert standing to challenge a forest plan *might* be found, but none of which has much to do with the claims that they actually made in this case. Even the theories they *now* tender reflect a fundamental misunderstanding of standing and ripeness principles set forth in this Court's cases.

On the merits, they urge this Court to disregard the Sixth Circuit's bias discussion as *dicta*. Then, with no sense of the irony in their own plea, they urge *this Court* not to "reach out" to address the panel's ruling on clearcutting, on the theory that the clearcutting issue should not be decided "*in the abstract*." Resp. Br. at 48 (emphasis added). Instead, Respondents seek to demonstrate that the Wayne Forest Plan is "arbitrary" because planners did not value wilderness recreation in the way Respondents prefer.

I. Respondents' Complaint Is Not Justiciable

1. Petitioner and the Solicitor General share common views that: (1) no concrete Article III controversy exists in connection with Respondents' facial challenge to the Wayne Forest Plan; (2) Respondents' facial critique of the Plan was not ripe for review; (3) a challenge to a specific ground-disturbing action directly affecting Respondents, undertaken under the Plan, would likely present a ripe controversy; and (4) in connection with a challenge to a particular action undertaken under the Plan, a court might well have occasion to address the lawfulness of the portions of the Plan material to the contested action, though the scope of review and relief would depend on the facts of the case.

2. Respondents' Complaint and the Sixth Circuit's decision focused on those aspects of the Plan that bear upon timber harvesting. As shown in the opening briefs, however, Respondents have no standing to challenge the Plan in isolation based on "injury" that may later result from a subsequent decision to hold a timber sale. Pet. Br. at 11-14; Fed. Br. at 22-24. Because forest plans do not dictate that timber harvesting *will* take place on any particular tract or in any particular manner, they do not create any imminent, direct, or particularized environmental injury. It is speculative to conclude that a change in the Plan's guidelines would redress any personal environmental injury at a specific location.

Moreover, Respondents' facial challenge is simply not ripe for review. Too much has to happen -- and might not happen -- before Respondents would be affected in any concrete way by any aspect of the Plan they challenge. A court cannot anticipate in what form and locations the ground-disturbing actions feared by Respondents might take place. Any timber sale would require a second stage of decisionmaking and a wide range of site-specific considerations that bear importantly on the way the Plan is interpreted and applied.

Respondents now appear largely to disavow injury from timber harvesting as the basis for standing. They do *not* explain, however, how their new non-logging theories of standing could possibly justify, in either Article III or ripeness terms, their assault (and the Sixth Circuit's holdings) on the timber harvest-related aspects of the Plan, including the standards for even-aged harvesting.[1] Respondents' basic

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[1] Respondents (at 22-25) say that challenges to the nomination of land for Wilderness Act designation, or the Plan's conclusions on the allowable sale quantity ("ASQ") of timber, or the Plan's manner of addressing issues of species viability, each might present the kind of (continued...)

approach appears to be one in which litigants contrive some colorable theory that gets them into court, following which they are free to mount challenges, willy-nilly, to any aspect of the forest plan that catches their eye.

Respondents' approach highlights their failure -- and the Sixth Circuit's failure -- to appreciate the duty of restraint that justiciability principles impress on the federal courts. The purpose of a federal lawsuit is to afford concrete relief to a litigant, not to provide a forum for making forest policy. Where a broad, multifaceted, planning document -- even one that provides important guidance for future actions -- is the subject of an abstract facial challenge, it is easy to lose focus on the primary function of a lawsuit and to engage, as the Sixth Circuit did, in the kind of broad policymaking for which the federal courts are constitutionally ill-suited.

3. Because zoning is sometimes held subject to challenge, Respondents try to analogize a forest plan to a zoning ordinance. To this end, they recast their lawsuit as a challenge to the Plan's multiple use allocations. Respondents are correct that, like zoning, the Plan's management area designations describe permissible uses within geographic areas. But that is the limit of the analogy.

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[1](...continued)
claim that can be adjudged in the context of a facial challenge to a forest plan. All of these issues are presented here hypothetically; none of these issues is raised in the Complaint or addressed in the opinion under review. Respondents simply fail to appreciate the basic point: Just as the courts cannot address merits issues in the abstract, they cannot address justiciability issues in the abstract. Whether Respondents could raise a viable claim concerning these issues will depend on the precise nature of their claim on the merits, the precise agency action being challenged, and the nature of their alleged injury.

A zoning ordinance typically sets forth restrictions on a private party's use of his or her own property. In contrast, a forest plan sets forth the government's intentions for the use *of its own lands*. The plan may *indirectly* affect private interests, but a suit based on the possibility of *indirect* effects of the government's plans for the use of its own lands raises standing concerns. Where the challenge is to the "lack of regulation[] of someone else, much more is needed" to ensure an Article III controversy, including an "imminent" injury that has a "high degree of immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 564-65 & n.2 (1992). Further, this Court has reviewed zoning matters only where present injury exists without need of further application of law to facts, in contrast to Respondents' contingent injury here. *E.g.*, *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1667 (1997).

4. Respondents (at 23, 31-34) offer several new candidates for "injury" said to arise from the Plan's land use classifications. Respondents say they are "harmed by a variety of non-logging activities approved by the plan's land use allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, roadbuilding, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation."

a. Respondents' effort to rely on these non-logging injuries is misplaced. The Complaint, and Respondents' recent affidavit filings in the district court (which they invoke here), rely upon injury from timber harvesting and related road construction. Injuries from non-logging activities such as off-road vehicle use, utility construction, and *not* closing roads were *not* asserted and are *not* part of this case. *See* JA 13-26; Affidavits of Messrs. Ostrander, Scott, and Tockman (lodged). Further, the non-logging injuries would not provide standing to adjudge the timber issues decided by the Sixth Circuit (e.g., even-aged harvest only in "exceptional circumstances").

b. Respondents' non-logging hypotheticals suffer from many of the same defects as do their timber harvest theories. Where an environmental group plaintiff challenges the multiple use allocation at the plan level by seeking to increase the *percentage* of lands allotted to different multiple uses: (1) plaintiff would not be injured where the land allocated to a particular use does not match up to the areas actually used by plaintiff; and (2) it remains too speculative to conclude that a court order requiring a higher percentage of lands for wilderness recreation would redress plaintiff's environmental injury; the additional acres could come from anywhere in a national forest (which range in size from hundreds of thousands to millions of acres) and may not include the areas used by plaintiff. At bottom, only a proposal to develop a particular tract in a particular way provides the imminent, concrete, redressable injury-in-fact needed for standing based on environmental injury. *Lujan v. Defenders of Wildlife*, 504 U.S. at 564-65 and n.2 (1992). Respondents' "someday, somewhere in this vicinity" allegations of environmental injury do not satisfy Article III. *See id.* at 564-66.

c. Moreover, as with Respondents' timber harvesting theory of standing, the injury from most of the various new activities that Respondents say they fear -- e.g., road or utility construction -- would not occur until after a second stage of site-specific reviews and decisionmaking. Such "injuries" are contingent and not imminent. Respondents' "no development" wish remains fulfilled until a separately challengeable development decision occurs.

Respondents conceive a theory designed to overcome the fact that they will ordinarily suffer no injury until after a second stage decision on a specific project. They seize (at 34) on our concession that an off-road vehicle enthusiast who had used a forest area likely would have standing to contest a plan provision closing the area to such use. Respondents seek to

flip that concession, theorizing that by *not* designating more area in the management area they prefer, known as MA 6.2, the Plan has left more area *ineligible* for "consideration" for added protection in the form of road closings or bans on off-road vehicle use. Under this "ineligible for future consideration for affirmative protection" theory, they argue that the failure to afford this affirmative protection will not undergo any second-stage decision and urge that the absence of a formal second-stage decision should bear on the issue of ripeness for review.

Respondents' argument does not, of course, address the basic problem: a change to the percentage allocation will not certainly affect any specific parcel on which Respondents recreate, let alone actually result in some particular road within the parcel ever being closed.

Moreover, Respondents' hypothetical is just that; it does not represent either the legal claims or the facts of this case. The Plan does not close roads even within MA 6.2; it provides for future *consideration* of 650 miles of road closings throughout the entire national forest, not just in MA 6.2. *See* Plan at 3-7, 4-127. Thus, not only must Respondents overcome their basic Article III difficulty in tracing a change in the percentage allocation of land to a parcel of land that concerns them, and then to a project that may never take place, Respondents are at most concerned with the differential probability that roads will be closed in an MA 6.2 area rather than in some other area.[2]

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[2] Respondents (at 19-21, 26, 29, 32) cite several cases finding Article III jurisdiction where business plaintiffs were the subjects of regulatory schemes. Respondents seek our position on whether the timber industry might have standing to challenge a forest plan. No issue of industry standing is presented in this case. Whether industry (continued...)

Further, Respondents' argument that some aspects of the Plan's classification scheme may never be reviewable is simply not sufficient to overcome constitutional standing problems, nor is it a decisive point even as to ripeness. Certain policy decisions may not be reviewable because they cannot be presented in the context of the kind of case or controversy that the courts are comfortable addressing, or because the policy decision never results in a discrete injury to anyone.[3] This reflects the limited authority of the federal courts. The "assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

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[2](...continued)
has standing likely depends on the particular claims being asserted and the facts regarding injury. For example, a sawmill owner dependent on national forest timber might establish justiciability to challenge the immediate closing of an area in which he or she had already successfully bid on a timber sale or in which a sale had previously been planned, if the sale would prevent mill closure or loss of business. Nonetheless, lower courts have found timber interests lack standing in somewhat analogous circumstances. *E.g., Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808-09 (11th Cir. 1993).

[3] Respondents (at 22-23, 34) seem to revert to the theory that knowing there is land out there that is not going to receive affirmative protection is injury enough, citing a case holding that the "loss of affirmative" protection under a forest plan creates a cognizable Article III injury, *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). This kind of abstract, ideological injury has repeatedly been rejected as a basis for standing. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Respondents' generalized concern with the "immense tract of territory" covered by the Plan provides no basis for standing. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886-89 (1990). The psychological injury of knowing that certain lands have not been classified so as to offer affirmative protection is simply "too abstract" to be "legally and judicially cognizable." *Raines v. Byrd*, 117 S. Ct. 2312, 2317-18, 2320-22 (1997).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982).

d. The standing defect created by Respondents' failure to specify any particular parcel or particular road gives rise to a cautionary note. Respondents cannot overcome that defect in their theory by simply alleging they are concerned about some specific parcel of land or road and that, if they are correct on the merits, the specific parcel would be classified into MA 6.2 or the road would be closed. There is no viable legal theory that would result in that type of relief. No matter how one parses the NFMA, the Forest Service possesses a broad discretion to determine the classification of particular parcels as part of the planning process. *See* Pet. Br. at 34-43.

5. On the issue of Article III standing, Respondents invoke the discussion of causation in *Bennett v. Spear*, 117 S. Ct. 1154 (1997). They highlight that the challenged action need not be the "very last step in the chain of causation" where it "alters the legal regime" and has a "coercive effect upon the action of someone else." Resp. Br. at 36, quoting *Bennett*. They note that a plan establishes binding rules that "substantially influence" subsequent actions. *See* 16 U.S.C. § 1604(i) (decisions must be "consistent" with the plan).

As discussed in our opening brief, Respondents' facial challenge bears little resemblance to *Bennett*. In *Bennett*, the injury to be averted was quite specific -- a restriction on water from a reservoir available to irrigate plaintiffs' lands. The nature of the government action that threatened injury was likewise specific. The question was whether standing was precluded by the existence of a link in the chain of causation between the "biological opinion" and the final action implementing that decision by reducing available water. Because of the close, practical, and legal way that the

biological opinion controlled the ultimate government decision, such that a favorable decision would redress plaintiffs' feared injury, the Court found the additional step in the chain of causation to be no bar to standing.

Here, unlike *Bennett*, Respondents have difficulty with each aspect of the standing inquiry. They complain of no *specific* or concrete injury; no injury is imminent; there is no close connection between the relief that can be afforded and any benefit to them. Respondents here assert only that some vaguely defined change to the Plan might result in some vaguely defined benefit to them. Indeed, the statutory requirement that actions be "consistent with" the Plan is also not likely to determine the outcome of any future decision to offer a timber sale, or build a road, or allow construction of a utility line. Rather, the Plan's general prescriptions provide only some of many factors that -- along with a range of other legal requirements, other Plan requirements, and site-specific environmental and economic considerations -- will govern any particular decision under the Plan. *See* Pet. Br. at 12-16.

Under Respondents' argument, the mere fact that a regulation is final and binding, and thus is likely to have *some* legal effect on unspecified future action, would create standing. But the existence of a binding rule only begins the inquiry. The requirements still remain that the Complaint focus on an imminent concrete injury, traceable to the challenged action and redressable by the court.

6. Citing *Defenders*, 504 U.S. at 572-73, Respondents (at 27-28) argue that the question whether the environmental impact statement ("EIS") on the Plan complies with the National Environmental Policy Act ("NEPA") presents a justiciable controversy. In *Defenders*, however, the Court insisted that plaintiff have "concrete interests" affected by the action on which the EIS was prepared. 504 U.S. at 572 n.7

and 573 n.8 ("We cannot agree" that standing exists "solely on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm"); *id.* at 572-78; *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (*en banc*). Because the Plan causes no concrete injury to Respondents, neither does the EIS.

Before a ground-disturbing action and environmental injury can occur, a second-level NEPA document (usually an environmental assessment) must be prepared. *Sierra Club v. Robertson*, 28 F.3d 753, 757-61 (8th Cir. 1994). Other challenges to initial NEPA documents have been found unripe where there would be a second-level NEPA document and a later opportunity for focused judicial review of the totality of NEPA compliance. *See id.; Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist.*, 752 F.2d 373, 378-79 (9th Cir. 1985); *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263-64 (2d Cir. 1982).

7. On ripeness, Respondents again emphasize (at 17-30) that the Plan is a final agency action. Finality is not determinative. There remains a strong preference for "case-by-case" adjudication that awaits "some concrete action applying" a general policy. *Lujan v. NWF*, 497 U.S. at 894. *See Renne v. Geary*, 501 U.S. 312, 322-24 (1991); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163-64 (1967). Respondents do not overcome that preference. As previously discussed, before undertaking any ground-disturbing action -- and certainly any timber harvesting activity -- the agency will consider a range of site-specific factors. The way the general prescriptions of the Plan relate to one another, and relate to the site-specific facts, cannot be anticipated by a court in a facial challenge to the Plan. *See* Pet. Br. at 12-15, 22.

a. The deciding factor on prudential ripeness normally is whether the challenged action causes an injury or hardship

that demands immediate redress. *Compare Abbott Lab. v. Gardner*, 387 U.S. 136, 149-53 (1967), *with Toilet Goods Ass'n*, 387 U.S. at 163-67. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57-58 (1993); *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 73, 81 (1978).[4] Respondents (at 21-30) have not pointed to any injury or hardship to themselves that springs directly from the Plan and that could not be redressed if or when a specific ground-disturbing action pursuant to the Plan threatens immediate environmental injury.

b. Respondents assert hardship in proceeding case-by-case and fear that the case-by-case approach may never afford

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[4] The cases Respondents cite in support of their ripeness theory are inapposite. One case merely found that persons with an interest in competing on an equal footing had standing to bring equal protection claims. *Northeastern Florida Chapter Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Several of those cases involve regulations that subject the regulated entities to the choice of compliance or potential criminal or civil penalties. *E.g., Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-301 (1979); *Abbott Lab.*, 387 U.S. at 153-54; *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-72 (1967). Other cases recognize the fact that regulatory requirements may impose immediate economic choices on those subject to the regulation. *E.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983); *Duke Power*, 438 U.S. at 74-77, 82. Finally, there are a series of cases in which the agency decision is fully determinative of any further decision on implementation , leaving no future discretion in the agency about how the decision is to be applied and will not be significantly affected by case-specific discretionary factors. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140-44 (1974); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593-95 (1923). This last group of cases is readily contrasted with the situation presented here. The Plan requirements have an impact but, by their nature, implementation decisions are highly discretionary and involve a range of factors.

them the opportunity to obtain broad plan-wide relief or trigger expansive judicial pronouncements on agency policy of the kind ventured by the Sixth Circuit. Yet, Respondents' argument only highlights a philosophical difference between Respondents' approach to the use of the courts and the role of the courts envisioned by the Framers and described in this Court's cases.[5]

Faced with a challenge to a specific action, a court may well be able to resolve the controversy by focusing on case-specific facts, without addressing policy issues. Thus, abstract questions about plan provisions may be avoided entirely -- while still affording plaintiffs complaining about specific actions particularized relief. Respondents would undoubtedly see that result as a bad thing. Their objective is to influence policy generally, rather than obtain specific relief. But that

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[5] Though this "case-by-case approach" is "understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection," separation of powers concerns confine a court to addressing issues in a concrete factual situation, absent a legislative directive to engage in broad review. *NWF*, 497 U.S. at 894. Specific legislative directives on expedited judicial review and limitations on later review influenced the results in the lower court cases Respondents cite at 38 and in *Regional Rail Reorganization Act Cases*, 419 U.S. at 138-46.

Respondents also note that the *agency* does not revisit certain plan-level decisions when it considers a ground-disturbing action. The Eighth and Eleventh Circuits have found that a *court* can address the legality of a plan-level decision to the extent necessary to resolve and remedy a site-specific controversy. *See* Pet. Br. at 4, 18-21. The issue in any case is not whether the agency revisits the issue, but when may a court prudently visit the issue.

result simply reflects the limited role of courts in federal policymaking.[6]

II. The Sixth Circuit's Expansive Rulings On Bias, Even-Aged Management, And Semi-Primitive Recreation Represent Serious Departures From The Norms Of Judicial Decisionmaking

1. Respondents (at 41 n.17) say that this Court can ignore the Sixth Circuit's discourse on Forest Service bias because it is *dicta*. They do not defend it.

The Forest Service's alleged bias was the overarching focus of the opinion below. The Sixth Circuit introduced its analysis with references to the presumption of regularity afforded agency decisionmaking, a presumption overcome by bias. The panel's analysis ended with bias, and references to bias appear throughout. Pet App. 5a, 7a-9a. It could only be the panel's view of the Forest Service's inherent bias that explains how it purported to find the Plan arbitrary without citing the administrative record, without identifying or responding to the agency's detailed analysis, and without describing its own analysis, except for reliance on a statutory section fundamentally inconsistent with the proposition for which the

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[6] Respondents (at 29, 39) emphasize that there have already been 40 timber sales under this Plan. The point cuts squarely against them on ripeness. Those sales were important to the Forest Service, to the individuals and businesses that rely on them, and to the communities that share in the proceeds. But they apparently did not violate the law or injure Respondents. Yet, if facial challenges like this one were permitted -- and the Sixth Circuit's decision on the merits were the law -- those non-injurious sales would not have occurred. These facts strongly confirm the wisdom of counseling the federal courts to proceed cautiously in considering broad challenges to forest plans.

court cited it. The panel's view that statutes bias the Forest Service in a judicially meaningful way is insupportable.[7]

2. Respondents also do not try to defend the panel's imaginative rulings that "16 U.S.C. § 1604(g)(3)(F)(v)": (1) requires "even-aged management techniques be used only in exceptional circumstances"; and (2) imports into the NFMA a highly "protective spirit" of wilderness preservation that the Forest Service must presumably employ in each and every policy-based decision. Pet. App. 6a, 8a.

As shown in our opening brief (at 41-46), 16 U.S.C. § 1604(g)(3)(F)(v) neither stands for nor supports either of these propositions.[8] After the Forest Service finds that an even-aged harvest at a particular site is appropriate (under § 1604(g)(3)(F)(i)),[9] (F)(v) requires the Forest Service to

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[7] Even if the panel's foray into institutional bias could be characterized as *dicta*, the impugning of an entire agency is such a radical departure from the appropriate norms of judicial review that it cries out for comment and correction. This Court possesses supervisory authority to dispose of the whole case and every aspect of the decision rendered below in a manner that serves the interests of justice.

[8] Respondents' effort (at 48) to paint the panel's holdings as merely a "semantical debate" on whether the NFMA "disfavors clearcutting" is implausible. Lower courts have already read the opinion as meaning that "the Sixth Circuit held [even-aged management] should be the exception rather than the norm according to the NFMA." *House v. United States Forest Serv.* 974 F. Supp. 1022, 1032 n.20 (E.D.Ky. 1997). *See Fener v. Hunt*, 971 F. Supp. 1025, 1033 (W.D.Va. 1997).

[9] Respondents (at 47-49) confuse the issue presented here when they argue that the Court need not address the "optimality" requirement of § 1604(g)(3)(F)(i), which the panel did not cite. Courts have concluded that this provision requires optimality to be addressed in the (continued...)

consider a range of interests in designing and conditioning the harvest at the site. Neither this section nor any other portion of the NFMA states a preference for recreation or against timber harvesting by even-aged or other techniques.

3. Respondents (at 41-47) nonetheless try to defend the panel's statement that the Plan arbitrarily fails to reserve enough acreage for "wilderness recreation"[10] and makes too much acreage potentially available for timber production. This defense is on economic grounds that are not apparent in the opinion below.

The panel reached its conclusion that the Plan was "arbitrary" only by first arming itself with the dubious beliefs about (1) pervasive agency bias in favor of timber production; and (2) a "highly protective spirit" for wilderness preservation supposedly embodied in the NFMA. So armed, the panel easily found the Plan arbitrary: the Forest Service had not shown any overt *preference* for wilderness or demonstrably renounced its "bias" in favor of timber. Neither of the twin pillars of the Sixth Circuit's analysis withstands even cursory scrutiny. *See* Pet. Br. at 26-43.

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[9](...continued)
context of a specific proposed sale, not the plan. *See* Pet. Br. at 41-43, 47-48. The Senate Report reveals that "optimum" means the most "conducive to reaching the specified goals of the management plan" and that this is a "broader concept than 'silviculturally essential' or 'desirable' - terms considered and rejected by the Committee." S. Rep. No. 94-893 at 39 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6698.

[10] Respondents and the panel mistakenly refer to "wilderness recreation." The agency concluded the Wayne contains no areas of Wilderness character as defined in the Wilderness Act, 16 U.S.C. §§ 1131-32, or any truly primitive areas. Semi-primitive recreation is the more accurate term in the Wayne. *See* FEIS at 2-65; DEIS at 4-67.

4. Instead, Respondents offer a technical, but no less flawed, theory that the Forest Service failed to satisfy 100% of the demand for wilderness recreation due to alleged economic errors in the timber suitability analysis and some runs of the FORPLAN computer program.[11] Respondents' theory suffers from the same defects as the Sixth Circuit's: it imports into the NFMA a series of preferences and obligations that are nowhere found in the NFMA or its regulations. Those theories fail to acknowledge the broad discretion to make policy choices and technical judgments that the NFMA confers upon the Forest Service. *See generally* Pet. Br. at 31, 34-43; *Amicus* Br. of Alabama Forestry Ass'n at 4-16.

a. No law requires that a forest plan satisfy 100% of the wilderness recreation demand (no matter how calculated) or accords that use any priority over timber production. Though the Plan may have satisfied only 50% of wilderness recreation demand, it is also true that the maximum timber sale volume foreseen by the Plan would have met only 40% of local timber demand. ROD at 19. The final Plan provides for semi-primitive recreation on 27,600 acres and anticipated timber harvesting on a maximum of 7,835 acres. ROD at 6; FEIS at 2-18.

The forest planning process makes choices between often-conflicting multiple uses and user groups, and those choices

[11] FORPLAN is a technical planning aid that, for a given set of economic inputs, will assign lands efficiently to the multiple uses identified in each alternative forest plan to generate the highest Present Net Value ("PNV") for that alternative. FORPLAN does not dictate the selection of a particular forest plan. In selecting a forest plan, the agency strives to maximize "net public benefits," which include non-economic, unquantified environmental amenities like semi-primitive recreation. *See* 36 C.F.R. §§ 219.3, 219.12(f); DEIS at 2-3 to 7, B3-2 to 4, B3-37 to 43, B4-2 to 4.

are entrusted to the Forest Service. The NFMA, MUSYA, and the 1897 Organic Act do not specify the relative weight to be attached to any use, beyond the historic primacy of timber production and watershed protection. Indeed, rather than create enforceable priorities, the NFMA was intended "to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sept. 30, 1976) (remarks of Sen. Humphrey). The Forest Service acted well within the scope of its discretion in the Plan's reconciliation of competing demands and classification for a mix of multiple uses.

b. Respondents assert (at 41, 47) that the Forest Service "ignored" the early successional habitat around the Wayne and "ignor[ed] public demand for wilderness." But this exercise in rhetoric mischaracterizes the record. The "demand" was not "ignored." The DEIS (at 3-2 and 26 to 28) included information on recreation availability throughout Ohio and compared land uses on federal versus non-federal lands.

c. Respondents err (at 42) in stating that 36 C.F.R. § 219.14(c) does not allow "money-losing timber sales." The regulation uses the term "cost-efficient," defined as the most efficient way to meet plan objectives (e.g., below-cost timber sales to provide wildlife habitat and community stability benefits), not above cost. 36 C.F.R. §§ 219.3, 219.14(c)(3); 44 Fed. Reg. 53969 (Sept. 17, 1979).[12]

[12] Because neither the NFMA nor implementing regulations require rigorous economic analysis, Respondents (at 45-46) rely on an internal Forest Service policy (the San Juan decision), which requires special justifications where planners propose to *expand* a below-cost timber program. The Forest Service and district court properly found that this policy does not apply to the Wayne, where a reduced timber sale program was proposed. Pet. App. 35a-36a, 92a-96a. In any case, the San Juan decision is an unenforceable informal agency policy. *See*

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Further, the NFMA and regulations do not bar below-cost timber sales or bar the inclusion of such sales in determining suitable timber lands.[13] Instead of following a corporate model of maximizing profits, the NFMA directs that the "harvesting system to be used is not selected primarily because it will give the greatest dollar return." 16 U.S.C. § 1604(g)(3)(E)(iv).

d. The regulations do not require the type of cost-benefit analysis and calculation of opportunity costs (foregone wilderness recreation benefits) that Respondents (at 43-44) demand. *See* 36 C.F.R. § 219.14(b) (analysis of only "direct benefits" and "direct costs" of timber production). Thus, what Respondents say was omitted was simply not required.[14]

12(...continued)
Schweiker v. Hansen, 450 U.S. 785, 789 (1981); *Swanson v. United States Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996).

13 *See* Pet. App. 30a-37a, 68a-69a, 90a-92a (district court's and Forest Service's interpretation); ROD at 21 (Wayne timber sale program is cost-effective). Other courts have found that "the inclusion of some 'below cost' timber in the timber base does not by itself constitute an abuse of discretion." *Sierra Club v. Cargill*, 11 F.3d 1545, 1550 (10th Cir. 1993); *Big Hole Ranchers Ass'n, Inc. v. United States Forest Serv.*, 686 F. Supp. 256, 263 (D. Mont. 1988). A "simplistic" approach to timber sales, such as the "amount of profit" after counting the additional costs of environmental analyses and operating constraints on federal lands, "is neither realistic nor particularly helpful in light of the statutory scheme"that makes it rational to invest in below-cost timber sales to remove a pest "infestation" or provide other benefits. *Churchwell v. Robertson*, 748 F. Supp. 768, 776 n.39 (D. Id. 1990).

14 While Respondents *now* question the way that the agency evaluated Wayne forest plan alternatives under 36 C.F.R. § 219.12, no § 219.12 claim was made in the Complaint. The Complaint did challenge the legality of the § 219.14 timber suitability *regulation* (JA 25-26), not its application in the *Plan*, and Respondents do not press
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e. Respondents make the same type of mistake when they focus on the computation of Present Net Value, which is an interim exercise in comparing the economically-measurable benefits of alternative forest plans. The PNV computations that Respondents critique had little influence on the selection of the final Plan. The Plan selected in this case had the fourth highest PNV of the forest plan alternatives. ROD at 28.[15]

14(...continued)
that claim here. Further, Respondents are misleading in their effort to make the timber suitability analysis (§ 219.14) part of the evaluation of alternative forest plans (§ 219.12). The stage of the suitability analysis that Respondents focus on occurs *after* the formulation of forest plan alternatives and simply applies each alternative's constraints. 36 C.F.R. § 219.14(c). *See* 47 Fed. Reg. 43033 (Sept. 30, 1982). Thus, the suitability analysis does not drive the selection of a forest plan or its mix of multiple uses. But it is sufficient for present purposes to note § 219.14 does not require that the opportunity costs of timber harvesting, such as foreclosing semi-primitive recreational uses, be part of the agency's economic analysis.

15 In this interim modelling step, providing rough dollar-value comparisons among different plan alternatives, the Forest Service clearly needs broad discretion on how to proceed. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir. 1985) (rejecting a recreation claim); Pet. App. 40a-42a. Since planners did assign a higher dollar value to semi-primitive recreation than to developed recreation and did employ the standard values established by regional willingness-to-pay studies, the values were not biased or arbitrary. *See* DEIS at B4-13. Since the DEIS (at B4-17) disclosed that a higher value for semi-primitive recreation might be justifiable, this fulfilled NEPA's informational purpose. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

Agency discretion certainly extends to technical matters, such as whether to address wilderness recreation as an opportunity cost of timber production in PNV estimates (as Respondents (at 43-44) would
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The Forest Service's ultimate choice of the Plan is based not on the interim step of comparing the PNVs of plan alternatives, but rather on the more amorphous concept of maximizing "net public benefits," which include unquantified environmental amenities. 36 C.F.R. §§ 219.3, 219.12(f). Here, in arriving at the final Plan, and after looking at the PNV results, the Forest Service added substantial additional land for semi-primitive recreation that it felt was not fairly measured in the economic model, but desirable nonetheless.[16]

Respondents' argument that greater "values" should have been afforded to wilderness recreation as part of the initial economic modeling of PNV simply inserts those interests at a different stage of the decisionmaking than where the Forest Service considered them. The fact remains the Forest Service plainly did consider the relevant issues. There is no basis upon which to suggest that its consideration was arbitrary.

CONCLUSION

The judgment of the Court of Appeals should be vacated or reversed, as appropriate.

15(...continued)
like), or whether to address such recreation in the net public benefits assessment and as a benefit where it is featured in an alternative forest plan (as the Forest Service did here, *see* page 20).

[16] *See* ROD at 28-30; DEIS at 2-77 to 84, B8-13 to 14; FEIS at 2-8; Pet. App. 123a-124a; Pet. Br. at 6. Since more people picnic, hike, and hunt in *roaded* areas of a national forest, the visitor-use days, and the total recreational dollar values for those activities, will be higher than for semi-primitive recreation. This results in a higher PNV. *See* DEIS at 2-84. Thus, Respondents' interests are advanced when the Forest Service addresses semi-primitive recreation as an unquantified contributor to net public benefit.

Respectfully submitted,

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